

## Department of Justice

## § 50.20

(e) The Department may conclude that restrictions on *ex parte* communications in particular rulemaking proceedings are necessitated by considerations of fairness or for other reasons.

[Order No. 801-78, 43 FR 43297, Sept. 25, 1978, as amended at Order No. 1409-90, 55 FR 13130, April 9, 1990]

### § 50.18 [Reserved]

### § 50.19 Procedures to be followed by government attorneys prior to filing recusal or disqualification motions.

The determination to seek for any reason the disqualification or recusal of a justice, judge, or magistrate is a most significant and sensitive decision. This is particularly true for government attorneys, who should be guided by uniform procedures in obtaining the requisite authorization for such a motion. This statement is designed to establish a uniform procedure.

(a) No motion to recuse or disqualify a justice, judge, or magistrate (*see, e.g.*, 28 U.S.C. 144, 455) shall be made or supported by any Department of Justice attorney, U.S. Attorney (including Assistant U.S. Attorneys) or agency counsel conducting litigation pursuant to agreement with or authority delegated by the Attorney General, without the prior written approval of the Assistant Attorney General having ultimate supervisory power over the action in which recusal or disqualification is being considered.

(b) Prior to seeking such approval, Justice Department lawyer(s) handling the litigation shall timely seek the recommendations of the U.S. Attorney for the district in which the matter is pending, and the views of the client agencies, if any. Similarly, if agency attorneys are primarily handling any such suit, they shall seek the recommendations of the U.S. Attorney and provide them to the Department of Justice with the request for approval. In actions where the United States Attorneys are primarily handling the litigation in question, they shall seek the recommendation of the client agencies, if any, for submission to the Assistant Attorney General.

(c) In the event that the conduct and pace of the litigation does not allow

sufficient time to seek the prior written approval by the Assistant Attorney General, prior oral authorization shall be sought and a written record fully reflecting that authorization shall be subsequently prepared and submitted to the Assistant Attorney General.

(d) Assistant Attorneys General may delegate the authority to approve or deny requests made pursuant to this section, but only to Deputy Assistant Attorneys General or an equivalent position.

(e) This policy statement does not create or enlarge any legal obligations upon the Department of Justice in civil or criminal litigation, and it is not intended to create any private rights enforceable by private parties in litigation with the United States.

[Order No. 977-82, 47 FR 22094, May 21, 1982]

### § 50.20 Participation by the United States in court-annexed arbitration.

(a) *Considerations affecting participation in arbitration.* (1) The Department recognizes and supports the general goals of court-annexed arbitrations, which are to reduce the time and expenses required to dispose of civil litigation. Experimentations with such procedures in appropriate cases can offer both the courts and litigants an opportunity to determine the effectiveness of arbitration as an alternative to traditional civil litigation.

(2) An arbitration system, however, is best suited for the resolution of relatively simple factual issues, not for trying cases that may involve complex issues of liability or other unsettled legal questions. To expand an arbitration system beyond the types of cases for which it is best suited and most competent would risk not only a decrease in the quality of justice available to the parties but unnecessarily higher costs as well.

(3) In particular, litigation involving the United States raises special concerns with respect to court-annexed arbitration programs. A mandatory arbitration program potentially implicates the principles of separation of powers, sovereign immunity, and the Attorney General's control over the process of settling litigation.

(b) *General rule consenting to arbitration consistent with the department's regulations.* (1) Subject to the considerations set forth in the following paragraphs and the restrictions set forth in paragraphs (c) and (d), in a case assigned to arbitration or mediation under a local district court rule, the Department of Justice agrees to participate in the arbitration process under the local rule. The attorney for the government responsible for the case should take any appropriate steps in conducting the case to protect the interests of the United States.

(2) Based upon its experience under arbitration programs to date, and the purposes and limitations of court-annexed arbitration, the Department generally endorses inclusion in a district's court-annexed arbitration program of civil actions—

(i) In which the United States or a Department, agency, or official of the United States is a party, and which seek only money damages in an amount not in excess of \$100,000, exclusive of interest and costs; and

(ii) Which are brought (A) under the Federal Tort Claims Act, 28 U.S.C. 1346(b), 2671 *et seq.*, or (B) under the Longshoreman's and Harbor Worker's Compensation Act, 33 U.S.C. 905, or (C) under the Miller Act, 40 U.S.C. 270(b).

(3) In any other case in which settlement authority has been delegated to the U.S. Attorney under the regulations of the Department and the directives of the applicable litigation division and none of the exceptions to such delegation apply, the U.S. Attorney for the district, if he concludes that a settlement of the case upon the terms of the arbitration award would be appropriate, may proceed to settle the case accordingly.

(4) Cases other than those described in paragraph (2) that are not within the delegated settlement authority of the U.S. Attorney for the district ordinarily are not appropriate for an arbitration process because the Department generally will not be able to act favorably or negatively in a short period of time upon a settlement of the case in accordance with the arbitration award. Therefore, this will result in a demand for trial de novo in a substantial proportion of such cases to pre-

serve the interests of the United States.

(5) The Department recommends that any district court's arbitration rule include a provision exempting any case from arbitration, sua sponte or on motion of a party, in which the objectives of arbitration would not appear to be realized, because the case involves complex or novel legal issues, or because legal issues predominate over factual issues, or for other good cause.

(c) *Objection to the imposition of penalties or sanctions against the United States for demanding trial de novo.* (1) Under the principle of sovereign immunity, the United States cannot be held liable for costs or sanctions in litigation in the absence of a statutory provision waiving its immunity. In view of the statutory limitations on the costs payable by the United States (28 U.S.C. 2412(a), 2412(b), and 1920), the Department does not consent to provisions in any district's arbitration program providing for the United States or the Department, agency, or official named as a party to the action to pay any sanction for demanding a trial de novo—either as a deposit in advance or as a penalty imposed after the fact—which is based on the arbitrators' fees, the opposing party's attorneys' fees, or any other costs not authorized by statute to be awarded against the United States. This objection applies whether the penalty or sanction is required to be paid to the opposing party, to the clerk of the court, or to the Treasury of the United States.

(2) In any case involving the United States that is designated for arbitration under a program pursuant to which such a penalty or sanction might be imposed against the United States, its officers or agents, the attorney for the government is instructed to take appropriate steps, by motion, notice of objection, or otherwise, to apprise the court of the objection of the United States to the imposition of such a penalty or sanction.

(3) Should such a penalty or sanction actually be required of or imposed on the United States, its officers or agents, the attorney for the government is instructed to:

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(i) Advise the appropriate Assistant Attorney General of this development promptly in writing;

(ii) Seek appropriate relief from the district court; and

(iii) If necessary, seek authority for filing an appeal or petition for mandamus.

The Solicitor General, the Assistant Attorneys General, and the U.S. Attorneys are instructed to take all appropriate steps to resist the imposition of such penalties or sanctions against the United States.

(d) *Additional restrictions.* (1) The Assistant Attorneys General, the U.S. Attorneys, and their delegates, have no authority to settle or compromise the interests of the United States in a case pursuant to an arbitration process in any respect that is inconsistent with the limitations upon the delegation of settlement authority under the Department's regulations and the directives of the litigation divisions. See 28 CFR part 0, subpart Y and appendix to subpart Y. The attorney for the government shall demand trial de novo in any case in which:

(i) Settlement of the case on the basis of the amount awarded would not be in the best interests of the United States;

(ii) Approval of a proposed settlement under the Department's regulations in accordance with the arbitration award cannot be obtained within the period allowed by the local rule for rejection of the award; or

(iii) The client agency opposes settlement of the case upon the terms of the settlement award, unless the appropriate official of the Department approves a settlement of the case in accordance with the delegation of settlement authority under the Department's regulations.

(2) Cases sounding in tort and arising under the Constitution of the United States or under a common law theory filed against an employee of the United States in his personal capacity for actions within the scope of his employment which are alleged to have caused injury or loss of property or personal injury or death are not appropriate for arbitration.

(3) Cases for injunctive or declaratory relief are not appropriate for arbitration.

(4) The Department reserves the right to seek any appropriate relief to which its client is entitled, including injunctive relief or a ruling on motions for judgment on the pleadings, for summary judgment, or for qualified immunity, or on issues of discovery, before proceeding with the arbitration process.

(5) In view of the provisions of the Federal Rules of Evidence with respect to settlement negotiations, the Department objects to the introduction of the arbitration process or the arbitration award in evidence in any proceeding in which the award has been rejected and the case is tried de novo.

(6) The Department's consent for participation in an arbitration program is not a waiver of sovereign immunity or other defenses of the United States except as expressly stated; nor is it intended to affect jurisdictional limitations (*e.g.*, the Tucker Act).

(e) *Notification of new or revised arbitration rules.* The U.S. Attorney in a district which is considering the adoption of or has adopted a program of court-annexed arbitration including cases involving the United States shall:

(1) Advise the district court of the provisions of this section and the limitations on the delegation of settlement authority to the United States Attorney pursuant to the Department's regulations and the directives of the litigation divisions; and

(2) Forward to the Executive Office for United States Attorneys a notice that such a program is under consideration or has been adopted, or is being revised, together with a copy of the rules or proposed rules, if available, and a recommendation as to whether United States participation in the program as proposed, adopted, or revised, would be advisable, in whole or in part.

[Order No. 1109-85, 50 FR 40524, Oct. 4, 1985]

### **§ 50.21 Procedures governing the destruction of contraband drug evidence in the custody of Federal law enforcement authorities.**

(a) *General.* The procedures set forth below are intended as a statement of policy of the Department of Justice